MALAYSIAN REPORTS

LAI SIEW WAH SDN BHD. v. NG CHIN

[S.C. (Wan Suleiman, Hashim Yeop A. Sani and Wan Hamzah S.C. JJ.) March 27 and December 31, 1987]

[Kuala Lumpur – Supreme Court Civil Appeal No. 407 of 1986]

Civil Procedure – Claim on contract – Agreement to refer disputes to arbitration – Action brought in court – Application to stay action – Allegation of fraud – Discretion of court – Stay refused – Arbitration Act 1952, ss. 6 and 25(3).

Arbitration – Agreement to refer disputes to arbitration – Action brought in court – Application to stay action – Discretion of court – Allegation of fraud – Stay refused – Arbitration Act 1952, ss. 6 and 25(3).

In this case, the respondent had brought an action based on a written contract between the respondent and the appellant. The written contract contained an arbitration clause. The appellant applied that the action be stayed. The learned judge at first allowed the application but subsequently after hearing further arguments in open court, he dismissed the application. The respondent, in opposing the application, had claimed that the action was based on a fraud which he alleged the appellant had perpetrated on him. The learned judge took the view that the respondent had given sufficient particulars in support of such allegation. The appellant appealed.

Held, dismissing the appeal: once the court is satisfied that there is a *bona fide* allegation of fraud against the appellants, then the discretion given to the judge under section 25(3) of the Arbitration Act 1952 was indeed properly exercised.

Cases referred to:

(1) *Radford* v. *Hair & Others* [1971] 2 All E.R. 1089.
(2) *Malaysia Government Officers' Co-operative Society Ltd.* v. *United Asia Investment Ltd. & Ors.* [1972] 1 M.L.J. 113.
(3) *Russell* v. *Russell* (1880) 14 Ch.D. 471, 477.
(4) *Willesford* v. *Watson* (1873) 8 Ch. App. 473.
(5) *Wallis* v. *Hirsh* 140 E.R. 131.

SUPREME COURT.

V. Pradhan for the appellant.

Harpal Singh Grewal for the respondent.

Cur. Adv. Vult.

Wan Suleiman S.C.J. (delivering the judgment of the court): The appellant is the defendant in High Court Kuala Lumpur Civil Suit No. C2728 of 1983. The action had arisen out of a written contract between the respondent/plaintiff and the appellant made on June 7, 1980, a further document referred to in para. 4 of the statement of claim, and an alleged oral contract between the parties.

Clause 10 of the written contract is an arbitration clause which reads as follows:

> "Any dispute or any matters in difference or concerning the construction of this agreement shall be referred to arbitration by a single arbitrator to be appointed by the president for the time being of the Board of Engineers and in accordance with the Arbitration Act 1952 (Revised – 1972) or any statutory re-enactment for the time being in force."

An application by the appellant under section 6 of the Arbitration Act 1952 for an order that

(1) the writ of summons issued in this action on October 17, 1983 and served on the defendant's solicitors on December 2, 1983 be stayed; and

(2) the plaintiff pays to the defendant its cost of and occasioned by this action, including costs of this application

was allowed after hearing in chambers but subsequent to an application for further arguments in open court under Order 56 rule 2(2) of the R.H.C., the learned judge heard further submission in open court, and reversed the order earlier made and dismissed appellant's application with costs. This appeal is against that order.

In opposing the application, the respondent had raised three grounds in his affidavit in reply to the appellant's, the first being that the action was based on a fraud which he alleged the appellant had perpetrated on him. The learned judge took the view that he had given sufficient particulars in support of such allegation, and in view of this finding decided that it would not be necessary for him to go into the other two grounds.

The particulars the learned judge referred to are to be found in the respondent's affidavit and repeated in the statement of claim wherein it was alleged that the appellant had fraudulently forfeited a sum of $33,218.75 lawfully due to him. The particulars of fraud are that there was an oral agreement between the respondent and one F.K. Lai, acting on behalf of the appellant, that upon the respondent completing the work contracted for, the respondent would have the right to refuse the purchase of the vehicle and to receive a refund of all moneys paid by him to the appellant. He further stated that the appellant, knowing that it

was not the true owner of the vehicle, falsely represented itself to be such, and also falsely represented to the respondent that he would be entitled to a full refund of all moneys paid by him. Further, the appellant, by itself and together with its solicitor, falsely represented to the respondent that upon his executing a certain document, the appellant would refund to him all sums paid by him. The respondent added that the appellant, by itself or aided by its solicitor, knowing the true nature of the transaction took steps to disguise it in the form of an agreement for the purpose of evading the provisions of the Hire-Purchase Act 1967. He went on to say that the appellant falsely represented to him when he demanded the return of his moneys that he was obliged to pay a further sum of $2,031.25 as he had purchased the vehicle. He further stated that the appellant utilized the agreement and/or the document to perpetuate a fraud upon him. He added that the appellant, by clause 8 of the agreement, while purportedly giving him an option to purchase the vehicle simultaneously, obtained the respondent's signature on an undated document which rendered the respondent a purchaser of the vehicle. Further, he alleged that the appellant, having purportedly sold the vehicle to him, continued to remain the actual owner thereafter and enjoyed the benefit of the vehicle. He also alleged that upon determination of the agreement and by effluxion of time, the appellant precluded the respondent from exercising his right to refuse purchase of the vehicle.

The respondent had relied on *Radford* v. *Hair and Others*[1] and *Malaysia Government Officers' Cooperative Society Ltd.* v. *United Asia Investment Ltd. & Ors.*[2] as authorities for the proposition that once the court is satisfied that one of the substantial matters at issue is an allegation of fraud on the part of a party (in the latter case, of the defendant), it could refuse an application by such a party for stay of proceedings.

There was therefore, as Mr. Pradhan admits, only one issue in this appeal which, to summarize his memorandum of appeal, is that the learned judge has erred in law in deciding that the allegation of fraud raised by the respondent precludes the appellant from invoking the arbitration clause.

Learned counsel referred us to *Russell* v. *Russell*,[3] an authority which he assured us was not cited in the *Malaysia Government Officers' Co-operative Society Ltd.'s* case.[2] In *Russell* v. *Russell*[3], Jessel M.R. (with whom we could respectfully concur) held that the mere making of a charge of fraud would not entitle a person to call upon the court to exercise its discretion to refuse a reference to arbitration. He found that there was no *prima facie* evidence of fraud, and therefore declined to exercise his discretion.

We were then referred to *Willesford* v. *Watson*.[4] Our attention was drawn to the headnote where it was held, *inter alia,* that neither the want of any appeal, nor the inability of the arbitrators to grant an injunction, formed any objection to a reference.

We are unable to see how that portion of the decision can assist the appellant.

The decision in *Willesford's* case depended solely on the construction of a most comprehensively worded arbitration clause. The court was thereby impelled to the view that it would be proper to leave it to the arbitrator to decide the matter between the parties.

This is obvious from the following passage of Lord Selborne's judgment at p. 480:

> "If parties chose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary courts, then since that Act of Parliament was passed a *prima facie* duty is cast upon the courts to act upon such an agreement.
>
> The parties here have made that agreement. They probably knew what were the reasons in favour of determining these questions by arbitration, and what were the reasons against it, and they made it part of their mutual contract that these questions should be so determined. The plaintiffs cannot, therefore, be now heard to complain if that part of their contract is carried into effect."

Finally, Mr. Pradhan, while conceding that *Wallis* v. *Hirsh*[5], an authority considered in the *Malaysia Government Officers' Co-operative Society* case[2], is against him, nevertheless argues that it can be distinguished, because there the affidavit supporting the application showed that the question to be tried was entirely one of fraud whereas in the present appeal, the alleged fraud was only one factor.

We cannot agree with learned counsel. Once the court below is satisfied that there is a *bona fide* allegation of fraud against the appellant, a finding with which we would agree, then the discretion given to the judge under section 25(3) of the Arbitration Act 1952 was indeed properly exercised.

We would accordingly dismiss this appeal with costs here and below. Deposit to respondent to account of taxed costs.

Appeal dismissed.

Solicitors: *Skrine & Co.; A.J. Ariffin, Chong & Harpal.*

MALAYAN UNITED FINANCE BHD. v. NOORMURNI SDN. BHD. & ANOR.

[S.C. (Wan Suleiman, Hashim Yeop A. Sani & Wan Hamzah S.C.JJ.) February 26, 1986 & October 31, 1987]

[Kuala Lumpur – Supreme Court Civil Appeal No. 280 of 1985]

Civil Procedure – Issue estoppel – Res judicata.

The appellants in this case had by various hire purchase agreements hired out to the first respondent, a limited company, various motor vehicles as set out in their statement of claim. The second respondent was the guarantor. The appellants had previously brought an action against the first respondent alone relating to the same subject, save that the first suit was in respect of eight out of the nine vehicles. The appellants in that suit applied for summary judgment under Order 14 of the Rules of the High Court but were unsuccessful and the respondents were given unconditional leave to defend.

The appellants did not appeal against the decision of the Senior Assistant Registrar in that case but discontinued their action with liberty to file afresh. The appellants then filed the present suit and again sought to obtain summary judgment under Order 14. The Senior Assistant Registrar allowed the appellants to enter final judgment but, on appeal, the learned judge held that the doctrine of "issue estoppel" applied and he allowed the appeal of the respondents. The appellants appealed to the Supreme Court.

Held, dismissing the appeal: (1) issue estoppel can arise even where a plea of *res judicata* cannot be established because the causes of action are not the same;

(2) the doctrine of *res judicata* is not a technical doctrine applicable only to records but it is a fundamental doctrine of all courts that there must be an end to litigation.

Case referred to:

1) *Carl-Zeiss-Stiftung* v. *Rainer And Keeler Ltd. & Ors. (No.2)* [1966] 2 All E.R. 536, 565.

SUPREME COURT.

N. Chandran (*T. J. Su* with him) for the appellants.

U. Harcharan Singh for the respondents.

Cur. Adv. Vult.

Wan Suleiman S.C.J. (delivering the judgment of the court): The appellants had by various hire purchase agreements hired out to the first respondent various motor vehicles, as set out in their statement of claim, the first respondent being a limited company and the second respondent the guarantor of the first respondent.

The appellants have previously filed a suit, K.L. High Court Civil Suit No. C1129 of 1981 (the first suit) against the first respondent alone relating to the same subject save that the first suit was in respect of eight out of the nine vehicles.

In the first action, the appellants unsuccessfully attempted to obtain summary judgment under Order 14, and the respondents were given unconditional leave to defend. The appellants discontinued their action and were granted liberty to file afresh.

There was no appeal from this decision which was made by the Senior Assistant Registrar. The appellants then filed the present suit, *i.e.* Civil Suit No. C83 of 1984 (the second suit), and again sought to obtain summary judgment under Order 14.

Counsel for the respondents submitted in the court below that since the issues between the parties had been finally decided on the merits in the hearing before the Senior Assistant Registrar in the first suit where the appellants' application for summary judgment had been dismissed, and where no appeal had been lodged, that decision was to be regarded as a final one, and the doctrine of "issue estoppel" would apply against them.

The learned judge in the court below agreed with counsel for the respondents and allowed their appeal against the decision of the Senior Assistant Registrar of February 6, 1985, wherein the latter had allowed the appellants to enter final judgment under Order 14 in the second civil suit.